Essays

Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*

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Society needs an adequate number and variety of independent law firms, and the legal profession has a responsibility to fulfill this need.[1]

By the term *independent law firm*, I mean one that comes close to having all of the following attributes: (1) the firm's only business is the practice of law; (2) the firm is owned exclusively by one or more lawyers who are engaged actively in the firm's practice (with narrow exceptions); (3) the firm requires its lawyers to exercise independent professional judgment (or, if the firm consists of one lawyer, that person exercises independent professional judgment); (4) the firm does not have any significant financial involvement with any of its clients other than cost reimbursements and fees payable in money; and (5) the firm does not expect to receive a major percentage of its fees from any one client.

Many law firms, perhaps the majority, are now independent law firms as the term is used here. Many lawyers, clients, and members of the general public may indeed understand the term "law firm" to mean one that fits my description of an independent law firm. Recently, however, some law firms have voluntarily given up one or more attributes of independence and some segments of the legal profession have advocated changes in the rules of conduct that would permit even greater surrender of the independence of law firms. These developments compel us to face the possibility that independent law firms in the aggregate may lose a significant part of their existing market share and social impact.

Society in general has not yet shown any great concern about the issue of law firm independence. Without waiting for society to perceive the problem, the legal profession should take action to assure the existence of an adequate number of independent law firms so that any client who wants to retain such a firm will have an opportunity to do so.

I do not suggest that all law firms must be independent as the term is used here, although society would be very well served if they were. I do suggest, however, that all law firms meet at least two minimal standards of indepen-

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1. Some of the ideas in this Essay are developed from my earlier publications. *E.g.*, Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications*, 41 VAND. L. REV. 789 (1988) [hereinafter Levinson, *Society Access*]; Levinson, *Professional Independence*, 18 VAND. LAW., Fall 1987, at 12; Levinson, *To a Young Lawyer: Thoughts on Disobedience*, 50 MO. L. REV. 483 (1985) [hereinafter Levinson, *Young Lawyer*].

dence included in my proposed attributes: All partners in all law firms should be lawyers[2] and all law firms should allow their lawyers to exercise independent professional judgment.[3]

Every lawyer—whether or not engaged in an independent practice—shares the profession's responsibility to assure the existence of an adequate number and variety of independent law firms that fully meet all of the proposed attributes of independence. By acting now, the legal profession can formulate solutions that serve the interests of both society and the profession. If the profession fails to take timely action, society will eventually perceive that the lack of independent law firms presents a problem. Society will then take action, but its solutions may not effectively meet its own needs or those of the legal profession.

The first step the legal profession can take to reach this objective is to establish standardized attributes of independent law firms together with requirements for disclosure so that each firm will be clearly and publicly identified as falling either inside or outside the category of independent law firms. The next step is to inform the marketplace about the attributes, advantages, and disadvantages of the independent law firm. The informed marketplace, in conjunction with appropriate regulatory action, should assure the survival of the independent law firm.

This Essay discusses society's need for independent law firms, the attributes of this type of firm, and the manner in which the legal profession can make sure society's need is satisfied. The Essay ends with a brief description of current developments that have placed similar issues on the agendas of the public accounting profession in this country and the legal profession in European countries, together with comments on the appropriate reaction of law firms in the United States to the emergence of these issues in other professions and other countries.

I. SOCIETY'S NEED FOR INDEPENDENT LAW FIRMS

Lawyers have much in common with members of other occupations. I will comment briefly on some of these areas of similarity before addressing the one feature that most significantly differentiates lawyers from members of other occupations. This feature gives society a special need for our independence, a need that can best be satisfied if our profession includes an adequate number of independent law firms.

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2. This minimal standard is currently imposed by MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103(A), 5-107(C) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b), 5.4(d) (1983); *see infra* notes 31-44 and accompanying text. My proposed attribute number two includes this minimal standard and in addition requires the lawyer-owners to be engaged actively in the firm's practice, with narrow exceptions.

3. This minimal standard is currently implied by MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 to 5-105, EC 5-1 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 2.1, 5.1, 5.2 (1983). In addition, courts in some states reinforce this minimal standard by providing a civil remedy for attorneys who are discharged for exercising their independent professional judgment; *see infra* notes 10-11 and accompanying text. According to my proposed attribute number three, the law firm should *require* its lawyers to exercise independent professional judgment; under this minimal standard, however, the law firm should at least *allow* its members to exercise such judgment.

A. *Similarities Between the Legal Profession and Other Occupations*

Lawyers share many common features with members of other occupations. For example, we are engaged in a type of business; we offer a unique service which imposes on us a unique set of obligations; we generally protect the domain of our profession against encroachments by members of other occupations while we occasionally try to encroach on theirs; and we call for self-governance rather than governmental regulation although we are subject to both.

1. *Business*

According to some commentators, the "profession" of lawyers is sharply contrasted to the "business" of people who make their livelihoods in other ways.[4] This contrast—often carrying the implication that profession is superior to business—is not a useful contribution to today's dialogue about lawyers and their place in society. To the contrary, the implied distinction encourages us lawyers to inflate our own self-image while producing a corresponding backlash of resentment in others.

The terms "profession" and "business" each have a number of meanings. In this Essay I will reflect my preference by using the terms interchangeably to mean, as indicated by the context, either (1) the occupation a person follows in earning a living, or (2) the community of people engaged in an occupation. In addition, I will sometimes use the term "business" to mean (3) a profit-oriented enterprise engaged in by any occupation. To illustrate these meanings in a single sentence, I regard a law firm as a business (meaning number three) in which members of the legal profession (meaning number two) engage in the profession (meaning number one) of practicing law. I see nothing demeaning in calling a law firm a business, and I do not think I would improve a law firm or its image if I called it, instead, a professional practice.

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4. *See, e.g.*, Commission on Professionalism, American Bar Association, ". . . *In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in* 112 F.R.D. 243 (1986) (Report to the ABA Board of Governors and House of Delegates, New York, N.Y., August 1986). For a critical commentary, see Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOYOLA U. CHI. L.J. 1149 (1987).

See also Stanley, *Lawyers in Business*, 8 N. ILL. U.L. REV. 17 (1987); *Meaning of Professionalism . . .*, 1 PROF. LAW, Spring 1989, at 1.

In 1988 the ABA Section on Torts and Insurance drafted a "Lawyer's Creed of Professionalism" as an example of guidance that state and local bar associations may provide to their members. The ABA House of Delegates authorized publication of the Creed without adopting it as ABA policy.

For some general theories of professions, see R. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES 1-30 (1988). For some futuristic views of the legal profession in the United States, see, *e.g.*, Brill, *The Law Business in the Year 2000*, AMER. LAW., June 1989, Pullout Management Report, at 1, *reprinted in Tough New World*, Special Reprint Issue of AMER. LAW., Fall 1989, at 9; Gibbons, *Law Practice in 2001*, A.B.A.J., Jan. 1990, at 68; Symposium, *The Growth of Large Law Firms and Its Effects on the Legal Profession and Legal Education*, 64 IND. L.J. 423 (1989).

2. *Unique Service and Obligations*

The legal profession is unique because it renders a unique service to society. Every other profession is also unique in offering its own service, otherwise we would not be able to identify it as a profession at all.

A person who engages in any occupation incurs a set of obligations, some of them legally enforceable and others based only on general consensus or individual perceptions of moral duty.[5] Many of these obligations are virtually identical for all occupations. This common core of obligations generally includes the following:

(1) Duties to client, such as informed consent (based on fair diagnosis of the need), competent service or satisfactory products, confidentiality, courtesy, and reasonable price;

(2) duties to other persons in the same profession in support of such programs as education, apprenticeship, reasonable sharing of expertise and advice, testing for competence, imposition of discipline against the unqualified, and fair methods of competition;

(3) duties of fairness to directly-affected third parties; and

(4) duties to society involving general conformity to the public interest and special efforts to provide essential services. If a person engages in an occupation with the benefit of a monopoly or other special privilege conferred by society, that person may owe society additional duties—to engage exclusively in that occupation and to make sure society receives an adequate supply of the services or products of that occupation.

Each profession owes, in addition, its own unique set of obligations to these constituencies, reflecting reasonable expectations in relation to the service offered by members of that occupation. We usefully may recognize some common characteristics shared by a group of professions. For example, a lawyer's duties are to some extent similar to those of a physician, an accountant, or a member of another profession offering expert personal services of one kind or another. Society has traditionally expected members of these "expert personal service" professions to practice either in independent firms of practitioners in their respective professions or as relatively independent employees of business enterprises, but not in the types of conglomerate organizations that have become customary in such professions as manufacturing and merchandising. The full range of lawyers' duties to society is unique, although some of the components are similar to those owed by every profession and some are similar to those owed by the expert personal service group of professions.

The duties to the several constituencies sometimes conflict. In addition, conflict may arise between the duties to these constituencies on the one hand and the personal values of the professional on the other. The potential for conflict is even greater for the person who works as an employee, such as the associate of a law firm. The associate's primary constituency is the management of the law firm, but the associate also incurs some level of obligation to the constituencies of the law firm itself. In addition, the associate's personal values con-

5. *See* Levinson, *Professional Independence*, *supra* note 1.

tribute to that individual's decisional process. A partner in a law firm faces many of the same problems as the associate because the partner's primary constituency is also the management of the firm. While the partner has a voice in management, the partner always faces the risk of being outvoted.

Each professional, whether lawyer, automobile mechanic, or zookeeper, must work out the inevitable conflicts. The specific duties to society are different in each profession, but the need to accommodate conflicting duties is universal.

3. *Protecting and Expanding Domain*

Each occupation is likely to cling to its own distinctiveness. A traditional method is to define the services that may be rendered by members of the profession, prevent nonmembers from rendering these services, and establish elaborate controls on entry into membership. This type of control is most effective when imposed by governmental action, such as the statutes and rules of court that provide for the licensing of qualified persons as lawyers while prohibiting unlicensed persons from engaging in the practice of law. Members of a profession may also attempt to stake out their domain through market mechanisms, such as public relations campaigns urging consumers to support businesses that display the emblem of membership in a certain voluntary organization. The motivation for preserving the domain of the profession may be, in part, the profession's concern for its own well-being and survival, and in part the profession's desire to serve the public interest by continuing to provide its special service.

Some members of each profession are likely to press beyond their profession's demarcated field. Their motivation may be, in part, a desire to compete against professional peers by offering a wider range of services in the spirit of one-stop shopping, and in part a desire to imitate the diversified type of business operation that has brought considerable excitement, and sometimes financial success, to other segments of society.

Individuals who try to extend their activities beyond those staked out for their occupation are likely to encounter resistance. First, they may be accused of encroaching on a field reserved exclusively for another occupation. Second, they may be accused of unfair competition against members of their own profession. Finally, if they have a monopoly or other special privilege regarding the exercise of their primary occupation, they may face two accusations—neglecting to provide society with service in the occupation covered by the privilege and taking unfair advantage of their privilege by using it as a steppingstone to other activities.

Today's legal profession faces serious questions of domain. Some law firms are currently branching out into nonlaw fields of business, thereby seeking to expand into new domains.[6] Some bar associations have recently sought changes in the rules to allow law firms to admit nonlawyers as partners and, as this Essay was going to press, the District of Columbia Court of Appeals amended

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6. Chauvin, *A Conscientious Conclusion*, A.B.A.J., Mar. 1990, at 8; Gibbons, *Branching Out*, A.B.A.J., Nov. 1989, at 70; *Is Ancillary Business the Future?* 1 PROF. LAW., Summer 1989, at 1. *See infra* notes 18-30 and accompanying text.

its rules to allow firms to admit nonlawyer partners in limited circumstances.[7] The advocates of nonlawyer partners do not propose that the nonlawyers engage in the practice of law. Rather, the proposal to admit nonlawyer partners is intended as a means of expanding the law firm's practice into new domains or obtaining a source of investment capital. For reasons discussed throughout this Essay, I assert that an adequate number of law firms should limit their domain to the practice of law and that no law firm should admit any nonlawyer to partnership.

4. *Self-governance vs. Governmental Regulation*

Members of a profession understandably welcome governmental licensing laws to protect their exclusive right to engage in a specific occupation. At the same time, members often assert the superiority of self-governance over governmental regulation.

In fact, each profession is likely to face a combination of governmental and nongovernmental regulation. Despite recent tendencies toward deregulation and free competition, licensing laws provide a basic framework for governmental control of many occupations, including the practice of law. In the case of licensed professionals, the question is not whether government will regulate, but how far this regulation will go. An organization speaking for the profession may persuade the government to regulate in a benign manner by demonstrating that the profession has its own means of maintaining standards in the public interest.

Lawyers talk a lot about the self-governance of our profession but we are actually regulated pervasively by government. Some of the regulation is contained in rules of court and is administered by judges, in contrast to the legislative and executive actions that regulate members of other occupations. Regulation by judges is, nevertheless, regulation by government, and this is not changed by the fact that many of the judges are lawyers. The average lawyer can exert no more control over the judge than the average physician can exert over the legislative and executive officials who regulate the practice of medicine.

One of the most heavily regulated occupations is that of the litigator, who practices law in the very presence of a judge who can enforce standards instantly. Even nonlitigating lawyers are governed by detailed rules of conduct. We participate to a limited extent in the government's regulation of our profession; for example, we provide input during the rulemaking process, our members often serve on disciplinary boards, and we have some influence on the selection of the judges who, in turn, generally control our disciplinary system. Within the framework allowed by governmental regulation, we can adopt additional standards for our own self-governance, such as establishing committees to render advisory opinions on proper professional conduct or voluntary programs for ren-

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7. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577 (1989); Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461 (1989); Gilbert & Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383 (1988). *See infra* notes 31-44 and accompanying text.

dering *pro bono* service. Later in this Essay I will consider the possibility of our adopting voluntary standards of law firm independence.

B. *Distinctiveness of the Legal Profession*

I perceive only one feature that significantly distinguishes the legal profession from all others. This feature is the connection between the legal profession and the legal system. We derive our uniqueness from that of the legal system, which reflects society's achievements and its aspirations for structuring an orderly community. Society has made an incalculable investment in the creation and refinement of its legal system. We lawyers have participated in the process as members of society and as experts in the law, but the constantly evolving legal system belongs to society, not to our profession. The essence of our business as lawyers is to make society's own legal system accessible to society.[8]

Some nonlawyers render similar services to a limited extent, but only lawyers demonstrate the expertise needed to render the full range of legal services and only lawyers are licensed to render the full range of these services. The legal profession is the dominant source of legal services as regards market share and social impact.

This connection with the legal system prompts me to describe ours as a public profession, or at least a quasi-public one. The license to practice law is one of the highest honors society can confer on any of its members. We are allowed to earn a living—and some of us earn very handsome livings—from exercising our profession. We should never forget the duty that comes with the license.

C. *Legal Profession's Special Need to Preserve Independence*

Society has allowed the legal profession, and no other group, to perform the function of making society's legal system accessible to society. We are fiduciaries of the legal system. Like other fiduciaries, we must perform our duties in the exercise of our own independent judgment and we must perform these duties ourselves, without delegating them to anyone else. For this reason, we have a special obligation to do whatever we can to preserve our independence, for society's sake as well as our own.

An independent legal profession is in the strongest possible position to give clients objective advice and vigorous representation. The delivery of this service benefits not only the clients but also third parties, including government, who rely on the service. Society benefits as well, first because society has an interest in making sure that everyone has access to the best possible legal service, and second because the rendition of legal service to any client contributes, in its own way, to the evolution of the legal system itself. In order to produce these benefits, the legal profession has recognized its duty to help make legal services available to everyone who needs them, although we are far from achieving this objective.

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8. *See* Levinson, *Society Access*, *supra* note 1.

An independent legal profession offers other benefits to society besides the functions of advising and representing clients. The legal profession has played a key role in bringing legal issues to the attention of society, initiating and debating proposals for law reform, confronting governmental arbitrariness, and discouraging governmental tyranny. Virtually all judges of courts of general jurisdiction are recruited from the legal profession and many judicial appointments are heavily influenced by the recommendations of the legal profession.

The role of the legal profession in society is often embroiled in controversy. We have not always received a good press, neither have we always deserved one. Our bad press may be, in part, an inevitable result of our role as advisors, representatives, and advocates, but it also results in part from our own shortcomings. Our profession has many defects and we face a long, hard journey before we can overcome them. On balance, however, I am convinced that we have conferred essential benefits upon society, and that we can and should continue to do so. We can best improve ourselves and serve society by preserving and strengthening the independence of our profession.

A strong and independent legal profession could itself pose risks to society by identifying with an oppressive regime, establishing its own enclave of privilege, or in other ways frustrating the public interest. These risks are most likely to materialize if access to the profession is limited on the basis of gender, social class, political affiliation, or wealth. When faced with a limited-access legal profession, society must depend on the profession's own *noblesse* or on countervailing forces to protect against abuse by the profession.

In recent years the legal profession in the United States has identified more closely with the public interest than in the past, due in part to the increasing presence of lawyers from previously underrepresented segments of society. The continuation of this trend toward a legal profession that reflects society in all its diversity provides the best assurance that the profession will serve the public interest. In planning for the legal profession of the future, therefore, we may anticipate a profession that can be entrusted with a substantial level of independence.

The new Code of Conduct for Lawyers in the European Community provides a valuable perspective, although the role of law and the legal profession may vary appreciably from one country or continent to another. The European Code insists on the complete independence of individual lawyers and the profession as a whole. The Code asserts that "the existence of a free and independent [legal] profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in [the] face of the power of the state and other interests in society."[9]

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9. COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY, CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY § 1.1 (1988). The organization is generally known as CCBE, derived from the French title "Conseil Consultative des Barreaux de la Communauté Européene" (although the word "Consultative" does not appear in the official French title of the Council). For further discussion of developments in Europe, see *infra* notes 70-74.

D. *How Independent Law Firms Can Contribute to an Independent Legal Profession*

The independence of our profession requires protection against pressure from various sources. Today's relatively tolerant regulation of lawyers, centered in the judiciary but involving other branches of government as well, could become oppressive if the political climate changed. Our relatively independent relationships with the political process, with the news media, with major economic forces, and with other professions could also be transformed into sources of serious pressure.

Public opinion is one of the factors that determine the level of our independence. As long as public opinion of the legal profession is generally favorable, we are likely to retain extensive privileges, including our monopoly over the rendition of legal services. If public opinion becomes generally unfavorable, we risk a reduction of our privileges.

Another significant factor is the extent of our freedom to exercise independent professional judgment when we render legal services. Our ability to exercise independent professional judgment depends, first, on our capacity to examine and evaluate the situation objectively, without having our perception impaired by competing forces. Once we have achieved objectivity, our exercise of independent professional judgment depends on our own perceptions of the risks we run by exercising our independent judgment and the manner in which we will react if these risks materialize. The independent law firm is in a strong position to achieve maximum objectivity, minimum risks, and maximum independence of its response to any risk that materializes. As indicated below, this type of firm can provide strength to lawyers in other situations, some of whom face higher risks and slimmer chances of reacting independently.

Most lawyers are employees—of house counsel staffs, of governmental law departments, or of law firms—facing risks that vary from one type of employment to another and from one jurisdiction to another. Governmental lawyers receive significant protection from civil service laws, from the public-spirited attitude of many of their supervisors, and from the availability of alternative careers in the private sector (often with higher compensation).

In the private sector the extent of the risk depends, in part, on the law of the controlling jurisdiction regarding the employment at will doctrine. Some states interpret that doctrine to deny any relief to an employee for discharge from employment, whether the discharge was based on a good reason, a bad reason, or no reason, unless the employment contract provides for a remedy. Other states, recognizing a public policy exception to the employment at will doctrine, give relief to employees if the employer violated public policy in discharging them from employment. Courts in the latter states might therefore give relief to an employed lawyer who was discharged for insisting on exercising professional judgment or complying with other rules of professional conduct.[10]

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10. *See, e.g.*, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) (recognizing cause of action for wrongful discharge of an employee—in this case a physician—when the discharge is contrary to clear public policy mandate). *But see* Herbster v. North American Co., 150 Ill. App. 3d 21, 501 N.E.2d 343

Even if a remedy for wrongful discharge is available, however, employed lawyers have strong incentives to avoid confrontation with their employers to preserve a trouble-free employment record.

Senior level employed lawyers, such as house counsel, have special responsibilities to exercise professional independence when advising corporate management and the board of directors. House counsel also owe a special duty to protect the professional independence of the junior lawyers they supervise. No doubt the vast majority of house counsel act with complete integrity, giving sound advice that persuades corporations to act legally and sensibly. But house counsel is a member of the management team, in daily contact with management, involved in management's planning process, often holding corporate office and owning shares or employee stock options. It may be difficult for house counsel to take an objective view of a legal issue that vitally affects the well-being of the corporation. Without an objective view, house counsel may be unable to exercise independent professional judgment. Similarly, general counsel of a governmental agency may be so deeply involved with other public officials in matters of planning and policymaking as to lose the objectivity required for the exercise of independent professional judgment. The lawyer employed as an associate in a law firm, or as junior counsel under the supervision of house counsel or governmental general counsel, faces special risks, to be discussed later.[11]

The law firm, as an independent contractor, presents a significant contrast to the employed lawyer. Of course the firm and its partners are under pressure to provide sufficient revenue to cover expenses and yield an attractive return to the partners. No firm takes a light view of exercising independent professional judgment if the likely result is loss of an existing or potential client. If, however, the firm is fully independent of its clients, the firm may be expected to achieve greater objectivity and exercise its independent professional judgment with greater freedom than could be expected of an employed lawyer. Within the law firm, the partner may have a voice in management and may have some protection against summary removal from the firm, but is still accountable to the firm's management and consequently faces some of the same risks faced by an associate.

The level of independence of the legal profession as a whole is determined to a great extent by the law firms in private practice. These firms are in the strongest position to give clients objective and independent advice. In addition, the firms are the major employers of beginning lawyers and provide ongoing opportunities for career changes by lateral moves from other segments of the profession. Thus an independent law firm may tend to attract independence-seeking lawyers away from other segments of the profession that offer a less

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(1989) (denying relief to head of in-house law department who alleged he had been fired for refusing to destroy documents sought in discovery and holding that every lawyer's contract of employment is, by implication, a contract of employment at will). A case on appeal from a New York trial court may give the appellate courts of that state an opportunity to rule on this issue. *See* Wieder v. Skala, 144 Misc. 2d 346, 544 N.Y.S.2d 971 (N.Y. Sup. Ct. 1989) (appeal anticipated to N.Y. App. Div.) (trial court relied on employment at will doctrine as basis for dismissing associate's complaint against law firm for wrongful discharge). *See generally* Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777 (1988).

11. *See infra* notes 47-49 and accompanying text.

independent setting. Further, corporate management may be willing to accept the sound advice of house counsel if management anticipates that an independent law firm is likely to reinforce that advice. In addition to their role in representing clients, the law firms also exert strong influence in bar associations, in making recommendations for judicial selection, and in the public forum. In each of these areas, the legal profession and society are best served if law firms generally possess a high level of independence.

In summary, firms engaged in the private practice of law tend to function as pacesetters regarding the independence of the profession as a whole. So long as the legal profession includes a significant number and variety of independent firms, the entire profession is likely to maintain a reasonable level of independence.

II. ATTRIBUTES OF THE INDEPENDENT LAW FIRM

The Code of Professional Responsibility and the Model Rules of Professional Conduct require lawyers to meet certain standards of independence. For example, a lawyer may not admit a nonlawyer as partner in a law firm[12] and must exercise independent professional judgment.[13] This latter requirement is clarified in more detailed provisions to the effect that a lawyer may not represent clients with conflicting interests,[14] invest in the client's litigation,[15] or accept exclusive literary rights in lieu of a cash fee.[16] Although these rules address individual lawyers, they apply indirectly to the law firm as well.[17]

These provisions of the Code and Model Rules should remain in effect or be refined by the work of others. My proposed attributes partially overlap with the existing standards but go far beyond them in attempting to assure the independence of the law firm.

In discussing my proposed attributes of the independent law firm, I mention various advantages and disadvantages, including some that may relate only indirectly to the issue of independence. These matters have relevance because the whole question of independence requires an exercise of policy judgment, which can benefit from a broad view of all consequences likely to flow from adopting one approach or another.

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12. *Supra* note 2.

13. *Supra* note 3.

14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(j) (1983).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(B) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1983).

17. Model Rule 5.1 requires partners and supervisory lawyers to ensure that the law firm complies with the rules of professional conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1983). In addition, both the Code and Model Rules recognize the existence of law firms, for example, by prohibiting a lawyer from accepting employment if another lawyer in the same firm is precluded, on certain grounds, from accepting the same employment. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.10, 1.11 (1983).

A. *The Firm's Only Business Is the Practice of Law*

Within the past few years, law firms have branched out into nonlaw activities at an unprecedented pace. A recent article in the American Bar Association (ABA) Journal reports that forty-five law firms own nonlaw businesses, either as divisions of the law firm or as affiliated or subsidiary enterprises.[18] In my view, these law firms are not engaged in the independent practice of law. If all law firms in the country followed their example, the independence of the legal profession would be seriously impaired and possibly destroyed.

In the current controversy, the issue is whether law firms may properly engage in activities which everyone concedes are outside the practice of law. No serious dispute has yet arisen as to the meaning of the term "practice of law" in this context. Anticipating that such a dispute may arise in the future, we must consider how to define the term.

One approach is to use the term in this context with the same meaning it has in connection with statutes prohibiting the unauthorized practice of law; in that setting, the term refers to those services which only lawyers are permitted to perform. If the same meaning were used in the present discussion about limiting law firms to the practice of law only, it would mean that law firms may do only that which nonlawyers may not do. If applied literally, this meaning would prohibit the firm from rendering supporting services such as typing and investigation. It would also prohibit the firm from rendering certain types of legal services in areas in which the legal profession does not have a monopoly. For example, under federal law, tax practice may be performed by nonlawyers as well as lawyers.[19] From these examples it becomes apparent that the definition derived from statutes on the unauthorized practice of law is not suitable in the context now under discussion.

Instead, I suggest that the "practice of law" means, in this context, (1) the use of knowledge, skills, and judgment about the legal system,[20] together with the rendition of supporting services, (2) for the benefit of another person, (3) at a level of expertise and in a setting that a reasonable person would consider appropriate to the practice of law. This definition emphasizes the essential elements of the practice of law and allows the law firm to render supporting services, as well as legal services in areas where the legal profession does not have a monopoly, while giving some room for a reasonable person to interpret these elements in conformity with changing times and places.

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18. Gibbons, *supra* note 6. The types of nonlaw businesses found most often in these 45 law firms are: Consulting for financial services, 6 firms; employee benefits and labor relations consulting, 4 firms; financial newsletters, videos and seminars, 4 firms; international trade consulting, 9 firms; lobbying and legislative services, 7 firms.

The states in which these law firms most often branch out are: District of Columbia, 21 firms; California, 7 firms; Massachusetts, 5 firms; New York, 7 firms; Washington (state), 5 firms. Gibbons, *supra* note 6, at 73 (citations omitted).

19. The Agency Practice Act of 1965, 5 U.S.C. § 500 (1988), entitles any lawyer or certified public accountant to practice before any federal administrative agency (except the Patent and Trademark Office, which may impose additional requirements). Agencies may provide for the admission of other qualified persons, and for the discipline of all practitioners including lawyers, public accountants, and others.

20. This language accords with MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980).

The supporting services mentioned in the above definition clearly include the services of secretaries, investigators, and others who perform under a lawyer's supervision and in support of a lawyer's rendition of legal services. I would place, in the same category, services rendered by expert employees or consultants in nonlaw fields, such as accountants or economists, but only if they function under a lawyer's supervision and in support of a lawyer's rendition of legal services.

A law firm may, however, experience difficulty in obtaining the services of a nonlawyer expert who is willing to function under the supervision and in support of a lawyer. The lawyer may not have enough expertise in the nonlaw field to function effectively as a supervisor and the professional standards of the nonlaw expert may prohibit the expert from working under the supervision of anyone outside the expert's own profession. Existing rules tend, in addition, to discourage the employment of nonlawyer experts by prohibiting lawyers from sharing fees with nonlawyers.[21] I find these rules unjustified because fee-sharing does not impair the independence of the law firm. Accordingly I favor their relaxation to permit law firms to enter into fee-sharing or profit-sharing arrangements with nonlawyers, provided these arrangements do not give the nonlawyers any equity interest or managerial role in the law firm.

An independent law firm may prudently advise the client to obtain nonlaw services from experts outside the law firm who can collaborate with the law firm in the interests of the client without serving under the supervision or in support of a lawyer. As another solution, an independent law firm may consider recruiting dual practitioners licensed to practice both law and another profession. A person licensed, for example, both as a lawyer and a certified public accountant (CPA) may appropriately provide accounting advice in support of the law firm's rendition of legal services and may supervise nonlawyer CPAs who provide similar accounting advice.[22]

A closer question arises if the lawyer-CPA renders accounting services through a law firm in matters unrelated to the firm's rendition of legal services. The firm properly cannot be described merely as a law firm; it must instead fully identify the nature of its practice. In addition, the firm should make sure that each client fully understands whether each engagement will be for legal services, accounting services, or a blend of the two. This type of understanding is essential because the different types of engagement may involve different rules of professional conduct on matters such as confidentiality, and different expectations on the part of clients and third parties. If these requirements are met, it appears that a law firm can satisfy the essential attributes of independence even if a dual practitioner renders nonlegal services to the firm's clients in matters unrelated to the firm's rendition of legal services.

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21. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1983).

22. In the interest of full disclosure, I note that I am an attorney and a certified public accountant, have practiced each profession at different times, and am keenly aware of the different roles played and attitudes required by each profession.

No doubt the law firm that branches out beyond the practice of law offers some advantages. These include (1) the convenience of one-stop shopping, (2) the intellectual benefit of an ongoing relationship between the lawyers and nonlaw experts in the firm, (3) the ease and speed in selecting nonlaw experts, (4) the possible fee savings if the nonlaw experts provide brief consultations without having to be called in from the outside, and (5) the possible fee savings and maximization of quality resulting from the operation of a freely competitive market.

These advantages are, however, outweighed by the numerous disadvantages of branching out, except in the case of dual practitioners discussed above. The following risks would make me think at least twice before engaging in one-stop shopping if I were a client:

(1) The risk of distraction of the law firm from the practice of law, leading to the risk of impaired competence and diligence of lawyers and supervisors, especially if the lawyers themselves attempt to render nonlegal services;

(2) the risk that the conduct of nonlawyers will not be governed by coherent, enforceable standards which are compatible with lawyers' standards on matters such as confidentiality and conflicts of interest;

(3) the risk that the law firm will supervise nonlawyers inadequately, either because the lawyers lack the necessary expertise or because the nonlawyers are prohibited, by the rules governing their own professional conduct, from submitting to supervision by nonmembers of their professions;

(4) the risk that professional liability insurance and client security funds will not cover losses caused by nonlawyers;

(5) the risk that the law firm, having made an economic commitment to its nonlaw personnel, will tend to use them at full capacity, whether clients happen to need their services or not;

(6) the related risk that the law firm will lose its objectivity in advising the client (a) whether a nonlaw expert is needed, (b) if so, who that expert should be, and (c) if an expert is retained, whether that person is rendering satisfactory services at a fair price;

(7) the related risk that the work product of the law firm will not be credible or acceptable to third parties because of their doubts as to the law firm's objectivity with regard to the nonlaw experts;

(8) the risk that clients, potential clients, and third parties will be confused or misled as to the role of nonlawyers in the firm; and

(9) the risk that nonlawyers, even if not partners, will unduly influence the firm in (a) matters of law firm management (including, for example, decisions whether to accept unpopular clients, or on the selection, retention, and promotion of lawyers), (b) participation in activities of the legal profession (such as commenting on proposed new rules of conduct or establishing *pro bono* programs), and (c) performance of the public role of the legal profession.

If the legal profession becomes heavily populated and influenced by firms that offer significant amounts of nonlegal as well as legal services, we may anticipate the following additional disadvantages:

(1) The risk that the market will redistribute nonlegal as well as legal talent into the most profitable subject matter and geographical areas of practice, causing shortages in other areas;

(2) the risk that the market, after an initial flurry of fee reductions, will concentrate nonlegal as well as legal services in a small number of large firms, leading to fee increases;

(3) the risk that law firms will make attractive offers to governmental nonlawyers as well as lawyers, of employment after termination of governmental service, with the result that (a) nonlawyers as well as lawyers in government will have personal reasons for urging relaxation of current restrictions on postgovernment employment, (b) nonlawyers as well as lawyers will be tempted while in government to compromise the exercise of their independent judgment as public officials because of their personal interest in post-governmental employment, and (c) the relationship between law firms and government may become so close as to compromise the independence of both;

(4) the risk that society will perceive the legal profession as moving into nonlaw businesses through the unfair use of its privileged position (including use of information received in confidence from clients) and that society will react by revoking some privileges or otherwise curtailing the independence of the legal profession;

(5) the related risk that society will perceive the legal profession as neglecting the practice of law despite a huge unmet need for legal services and that society will react by revoking some privileges such as our monopoly over the rendition of legal services;[23] and

(6) the risk that the legal profession will lose its distinctiveness as it blends into a broader profession of business advisors; that it will attract a different type of person; that its members will develop a different self-perception; and that its traditional role in society will be forgotten and abandoned, or left in the hands of a relatively small and uninfluential group of practitioners who limit themselves to rendering legal services only.

I intend no disrespect to nonlawyers. Some of them may well be at least as diligent and socially sensitive as any lawyer. My point is simply that nonlawyers did not identify themselves with the legal profession when choosing a career; have not been imbued with the learning, traditions, values, lore, or public mission of the legal profession; may not even be familiar with our rules of professional conduct; and will inevitably impair the distinctiveness of the firm as a law firm. A law firm jeopardizes its independence by conducting a nonlaw business and by involving nonlawyers in any role beyond that of supporting the lawyers. If large numbers of law firms engage in this conduct, they will seriously impair the distinctiveness and independence of the legal profession.

As this Essay was going to press, the American Bar Association Section of Litigation adopted a recommendation imposing stringent limits on the rendition

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23. The possible erosion of the legal profession's monopoly is illustrated by Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985). *See also* Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 B.Y.U.J. PUB. L. 219, 252-54 (1988); Note, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245 (1990).

of nonlegal services by law firms.[24] If the ABA House of Delegates approves this recommendation, the policy of the ABA will be to urge state courts or legislatures to impose these limits by amending their rules of professional conduct.

In essence, the proposal would allow law firms to render nonlaw services which are ancillary to legal services rendered to the firm's clients, but only if the services are rendered by employees of the law firm.[25] The proposal would prohibit a law firm from using a subsidiary or affiliate as the means for providing nonlaw services which are ancillary to the practice of law, but would allow a law firm to own or operate an entity which provides services or products unrelated to the practice of law, and to own or operate real estate or other physical facilities.[26] The proposal reaffirms the ABA policy against admitting nonlawyers to partnership in law firms.[27]

If fully implemented, this recommendation would require every law firm to comply with the virtual equivalent of my first proposed attribute of independence—that the law firm's only business is the practice of law, including nonlaw supporting services. I do not object to the approach taken by the Recommendation in accomplishing this objective by adoption of across-the-board rules. As indicated later in this Essay, however, I would be satisfied with a less coercive approach, so long as it gave reasonable assurance that society would have access to an adequate number and variety of independent law firms.[28] I recognize the

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24. SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, RECOMMENDATION AND REPORT ON LAW FIRMS' ANCILLARY BUSINESS ACTIVITIES (Feb. 8, 1990). The matter is scheduled for possible action by the ABA House of Delegates in August 1990. The recommendation states:

1. A law firm (which shall mean an association of two or more attorneys, a partnership or a corporation engaged in the practice of law), or one or more attorneys in a law firm, shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services, except as provided in Paragraph 3.
2. Two or more attorneys who engage in the practice of law in separate law firms shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, except as provided in subsection (5) of Paragraph 3.
3. A law firm may provide non-legal services which are ancillary to the practice of law if:
   (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;
   (2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;
   (3) The law firm makes appropriate disclosure in writing to its clients; and
   (4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule; *provided however,*
   (5) Nothing in this rule shall prevent a law firm, or one or more lawyers, from (i) owning or operating an entity which provides services or products unrelated, and functionally unconnected, to the provision of legal services, or (ii) owning physical facilities (for use by the law firm and/or others) or otherwise owning real estate and serving as a lessor.
4. An individual engaged in the solo practice of law may provide non-legal services which are ancillary to the practice of law, subject to appropriate disclosure requirements.
5. The American Bar Association opposes any attempts to permit non-lawyers to obtain equity interests in law firms or otherwise permit them to share in legal fees generated by lawyers (except as provided in Model Rule of Professional Conduct 5.4(a) and Model Code of Professional Responsibility DR 3-102(a)).

25. *Id.*
26. *Id.*
27. *See supra* note 2.
28. *See infra* note 58-61 and accompanying text.

difficulty of designing a less coercive system that provides this level of assurance.

The Recommendation also coincides with my views by reaffirming existing rules that prohibit the admission of nonlawyers to partnerships in law firms.[29] The Recommendation is silent about the topics covered by my other proposed attributes of law firm independence.[30]

B. *The Firm Is Owned Exclusively by One or More Lawyers Who Are Engaged Actively in the Firm's Practice (with Narrow Exceptions)*

The independent law firm should be owned exclusively by one or more lawyers who are engaged actively in the firm's practice, with a few narrow exceptions. Under these exceptions, I propose to allow ownership, but without any managerial authority, by personal representatives of deceased owners, lawyers who take a temporary leave of absence from the firm, or lawyers who acquired their ownership interest during active practice with the firm and have retired completely from the practice of law. I will discuss the major aspects of the proposal separately—first, the exclusion of active nonlawyers from ownership; second, the exclusion of inactive nonlawyers; third, the exclusion of inactive lawyers; and finally, the proposed exceptional situations in which I would allow nonlawyers or inactive lawyers to own interests in law firms.

1. *Active Nonlawyers*

The rules of conduct in every jurisdiction currently prohibit nonlawyers from owning interests in law firms, except for the personal representatives of deceased members of the firm.[31] Effective January 1, 1991, however, the District of Columbia Court of Appeals will allow nonlawyers to be partners in limited circumstances.[32] For purposes of clarity, this Essay will refer to the rule that will take effect in 1991 in the District of Columbia as the "D.C. rule." The Essay will refer to the rule in all other jurisdictions as the "ABA rule" because it reflects the policy of the American Bar Association. The ABA rule is not controversial insofar as it allows personal representatives of deceased members to own interests in law firms. The remainder of the rule has been and continues to be controversial. It faced a serious challenge in the early 1980s when the Kutak Commission began drafting the Model Rules of Professional Conduct to replace the Code of Professional Responsibility. The first drafts of the Model Rules omitted this rule without comment. After the omission was exposed and debated, the Commission reinserted the rule and the ABA adopted it in 1983 as part of the Model Rules.[33]

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29. *See supra* note 2 and *infra* notes 31-44 and accompanying text.

30. *See infra* notes 46-56 and accompanying text.

31. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(C) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d) (1983).

32. *See infra* notes 34-44 and accompanying text.

33. *See* Gilbert & Lempert, *supra* note 7.

More recently, bar associations in two jurisdictions have petitioned their respective courts to repeal or relax the rule. The North Dakota Supreme Court decided to keep the rule unchanged. As this Essay was going to press, the District of Columbia Court of Appeals adopted new Rules of Professional Conduct effective January 1, 1991. These Rules include a new rule allowing nonlawyers to be partners in District of Columbia law firms.[34]

The precise impact of the D.C. rule is difficult to determine. A key provision allows nonlawyers to be partners in law firms provided they perform professional services which assist the firm in providing legal services to clients.[35] According to the comment accompanying the rule,

> the Rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of subparagraph (c) are met.[36]

The cited subparagraph prohibits nonlawyers from directing or regulating the lawyer's professional judgment in rendering legal services.[37]

In view of the comment quoted above, it appears that the D.C. Court would not allow law firms to offer partnerships to nonlawyers whose primary role is the "rainmaking" function of attracting clients to the firm.[38] The literal text of the D.C. rule, however, could be interpreted as allowing such persons to be partners on the theory that rainmakers comply with the rule by performing "professional services which assist the organization in providing legal services to clients."[39]

Under another provision of the D.C. rule, nonlawyer partners must undertake to "abide by" the rules of professional conduct for lawyers.[40] It is not clear whether this Rule would allow nonlawyers, for example, to determine the situa-

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34. DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT, *reprinted in* BAR REP., Feb./Mar. 1990, adopted March 1, 1990, effective January 1, 1991. The new rule on nonlawyer partners, Rule 5.4(b), is worded as follows:

> (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
>
> (1) the partnership or organization has as its sole purpose providing legal services to clients;
>
> (2) all persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;
>
> (3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under rule 5.1;
>
> (4) the foregoing conditions are set forth in writing.

Id., reprint supp. at 44-45.

35. DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 5.4(b)(1).

36. DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 5.4 comment, ¶ 7.

37. *Id.*, Rule 5.4(c).

38. See *infra* note 43.

39. DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 5.4(b).

40. *Id.*, Rule 5.4(b)(2).

tions in which a client's confidences could be revealed or in which conflicts of interest require withdrawal or disqualification.

Uncertainty also exists regarding the jurisdictional sweep of the new D.C. rule. Lawyers who are in partnership with nonlawyers will be allowed to practice in the courts of the District of Columbia effective January 1, 1991, but the D.C. rule cannot guarantee these lawyers the right to practice in federal courts because each federal court has the power to establish its own qualifications for admitting lawyers to practice.[41] Lawyers in the District of Columbia should also recognize that Congress, by amending the Agency Practice Act,[42] could restrict the right of lawyers with nonlawyer partners to practice before federal administrative agencies, or Congress could allow the agencies to exercise their own discretion in this area. Further uncertainties will face law firms that maintain offices in both the District of Columbia and other jurisdictions if the other jurisdictions determine that their own public policy is violated by the presence of a nonlawyer partner in the District of Columbia office of the law firm.

A firm that admits a nonlawyer as a partner, under any interpretation of the D.C. rule, will lose some of its independence. If other jurisdictions relax their rules and all law firms admit nonlawyers as partners, the legal profession will risk a substantial loss of its independence.

Again, I intend no disrespect to nonlawyers. My concerns here are similar to those expressed above regarding the rendition of nonlaw services with the following additional observations. The admission of nonlaw partners could confer an additional benefit upon the client by giving the law firm a better chance of attracting the most highly qualified nonlawyers. The additional disadvantage is that, if nonlawyers are partners, they are more likely to exert influence on the firm and, ultimately, on the profession. Even if the nonlawyer was a nonvoting partner with a share in the profits, that person would be likely to have some influence, similar to that of a holder of preferred stock in a corporation, especially in difficult times. Another concern is that the law firm's need for the professional services of the nonlawyer partner may fluctuate considerably. That person is unlikely to have the flexibility of a lawyer in being able to move into a different area of the firm's practice. Accordingly, the law firm may be tempted strongly to make full use of the nonlawyer's services even though clients do not really need them. If the nonlawyer's services cannot be used fully, that person's position as a partner is likely to end. If fluctuations in the law firm's practice cause nonlawyer partners to join and leave the firm in quick succession, the firm may face an undesirable level of volatility in the roster of its partners.

We should also consider the possibility that nonlawyers, if admitted to partnership, could serve the law firm as "rainmakers," bringing in new clients and doing little if anything else.[43] The firm could become heavily dependent on an effective nonlawyer rainmaker, and that individual could possibly exert even greater influence on the firm than could a nonlawyer who simply rendered a

41. C. WOLFRAM, MODERN LEGAL ETHICS § 15.2.4 (1986).

42. *Supra* note 19.

43. The importance of the role of the rainmaker is illustrated in Eichbaum, Lieberman & Pennachio, *Mid-size Firms Vie for Rainmakers*, Nat'l L.J., Jan. 29, 1990, at 24.

nonlaw service, such as accounting, to the firm's clients. Further, in the event of impasse or unacceptable conduct, the nonlaw partner would be more difficult to remove than a nonlaw employee or consultant.

The proposal now under discussion—to continue excluding nonlawyers from partnership in law firms—is the most important in this Essay. I urge retention of the ABA rule which imposes this standard on every law firm. If the rule is ever relaxed or repealed, I urge every law firm to continue voluntarily to admit only lawyers to partnerships.

The identity and distinctiveness of the legal profession stand the best chance of surviving if we permit only lawyers to be partners in law firms. Universal compliance with this standard will protect the legal profession by significantly limiting the ability of law firms to branch out into nonlaw businesses. Further, so long as the partners in law firms are all lawyers, we have an unimpaired opportunity to resolve our numerous other problems together with an undiluted responsibility to do so.

The ABA Section on Litigation recently adopted a recommendation to reaffirm the rule that allows only lawyers to be partners in law firms.[44]

2. *Inactive Nonlawyers*

If nonlawyers are allowed to become partners (or shareholders) in a law firm without being active in the firm's practice, they can provide a useful source of financing but will impair the firm's independence because of their expectation of a return on investment. Even if the inactive nonlaw investors owned nonvoting preferred stock, they would still be in a position to exert pressure on the law firm, as indicated above in the case of a nonvoting active partner.

Many firms are heavily dependent on professional liability insurance carriers, banks, or other sources of insurance and financing. I recognize that insurance and debt financing are virtual necessities. I can only hope that law firms can obtain them without unduly yielding their independence to these sources. My proposal, however, prohibits equity financing by inactive lawyers. The distinction may in some situations be perceived as arbitrary and formalistic. Sensing the need to draw a line somewhere, I make the distinction based on the assumption that debt can be paid off, if necessary by refinancing, in contrast to the relative permanence of equity investment, and that lenders are less likely than owners to exercise significant control over the firm's management.

3. *Inactive Lawyers*

Existing rules tacitly allow ownership of interests in law firms by lawyers who are not active in the firm and who may not be active in any firm. Thus, the rules now allow a lawyer to be an inactive investor in an unlimited number of law firms. The rules also apparently allow law firms to own interests in other law firms.

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44. *See supra* note 24.

These possible arrangements depart from the tradition of the owner-managed law firm. They produce a separation between the law firm's owners and its working personnel, requiring delegation of decisional authority from the owners to managers. Individual lawyers in the firm may then have no access to the owners, although the owners remain ultimately responsible for the decisions of the firm.[45]

Ownership by inactive lawyers is not as serious as ownership by nonlawyers. It does, however, impair the independence of those who work for the firm by placing them under the ultimate control of inactive lawyers in a situation where the workers do not have an opportunity to discuss professional issues with these owners. Such a firm does not provide its lawyers with the *camaraderie* or sense of professional equality which are most conducive to the exercise of independent professional judgment. In the interests of the professional independence of all lawyers in the firm, I suggest that inactive lawyers should not own interests in law firms except in the limited situations mentioned in my proposal and discussed below.

4. *The Proposed Exceptions*

My proposal allows three categories of persons to own interests in law firms although they are not lawyers actively engaged in the firm's practice. In each of these exceptional situations, however, the owner must not have any managerial authority.

My first exception simply preserves the existing rule that allows personal representatives of deceased owners to retain the interests of their decedents for a reasonable period of time. The need for this rule is obvious and I am not aware of any controversy about it.

The second exception allows ownership by lawyers who take a temporary leave of absence from the firm. This type of situation could arise, for example, if a member of the firm was elected or appointed to public office under circumstances in which the law allowed that person to retain an inactive association with the firm. This situation is not likely to arise often and I do not regard my proposal on this matter as being controversial.

The final exception allows ownership without managerial authority by a lawyer who acquired his or her ownership during active practice with the firm and has retired completely from the practice of law. This would permit a law firm's partnership agreement to provide for fully-retired lawyers to remain with the firm as inactive partners, receiving income from the firm. I recognize that these retired lawyers, even without formal managerial authority, may exert some informal influence on the firm. In view of their prior service with the firm, I would find this influence quite appropriate.

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45. The owners clearly incur vicarious civil liabilty for conduct of the firm's personnel under traditional theories of tort law. In addition, the Model Rules of Professional Conduct require every partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1983).

On the other hand, my proposal would not allow a lawyer to retain an ownership interest in a firm if the lawyer leaves that firm in order to practice as a partner in another firm. It is inappropriate, in my view, for a lawyer to retain an ownership interest in two firms while practicing in only one of them. I recognize, however, that this aspect of my proposal may require reconsideration and revision in light of further study and comments.

C. *The Firm Requires Its Lawyers to Exercise Independent Professional Judgment (or, if the Firm Consists of One Lawyer, that Person Exercises Independent Professional Judgment)*

A law firm that practices law only and is owned exclusively by lawyers engaged actively in the firm's practice shows great promise of independence, but these two vital attributes are not enough to guarantee the firm's full independence. In addition, the firm should allow and require all of its lawyers to exercise their independent professional judgment.

If the law firm consists of only one lawyer, this simply requires that person to exercise independent professional judgment.[46] The matter is more complicated in larger law firms. In these settings, the partner who maintains top-level contact with the client should exercise independent professional judgment on behalf of the law firm, giving the objective advice and vigorous representation discussed earlier in this Essay. In addition, the firm, as a matter of policy, should allow and require lawyers who assist this partner to exercise their own independent professional judgment and to express any concerns to the partner. If these concerns are not resolved between the assisting lawyer and the partner, the matter should be referred to other members of the firm and, if necessary, to outside consultants and even to appropriate committees of the bar.[47]

I acknowledge that a law firm may face close questions of proper professional conduct, that reasonable and conscientious lawyers may disagree, and that someone must in the end be able to speak for the firm when advising and representing a client. I suggest, however, that assisting lawyers should be allowed and required to express their concerns in the manner suggested above.

My proposal on this matter raises issues that may arise, not only as attributes of law firm independence, but also in civil litigation or in lawyer disciplinary proceedings. If a lawyer brings a civil suit against a law firm and demonstrates that the firm discharged or otherwise penalized the lawyer for expressing concerns regarding an issue of professional judgment, the court should award relief to the lawyer in accordance with the public policy exception to the employment at will doctrine.[48] Young lawyers especially need this type of protection at the present time, when most of them graduate from law school owing tens of thousands of dollars in tuition loans. The burden of repaying this debt places significant pressure upon lawyers at the beginning of their careers. If a

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46. This accords with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980). A similar result is implied by MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 2.1 (1983).

47. *See* Levinson, *Young Lawyer*, *supra* note 1; MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment ¶ 2 (1983).

48. *See supra* note 10.

young lawyer faces this debt burden as well as the risk of discharge at the employer's will without any judicial remedy grounded in public policy, the lawyer may have great difficulty in complying with professional standards, although the rules clearly require compliance without regard to personal financial concerns.

In the area of professional discipline, Rule 5.2(b) of the Model Rules of Professional Conduct addresses a related issue in the following language: "A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[49] Clearly this Rule does not protect a subordinate lawyer from sanctions for committing a clear violation of the rules. The Rule leaves some ambiguity, however, as to how much leeway is available to the subordinate lawyer to plead the defense of "superior orders" to disciplinary charges.

The courts and disciplinary boards should excuse subordinate lawyers under Rule 5.2(b) only in the narrowest range of situations and then only if the subordinate made conscientious efforts to ascertain that the supervising lawyer's resolution of the matter was indeed "reasonable." This proposed interpretation would impose the maximum responsibility upon the subordinate lawyer, and would therefore confirm that lawyer's right and obligation to exercise independent professional judgment and to express concerns under appropriate circumstances.

Under my proposed attributes, then, the law firm should not penalize an assisting lawyer for raising concerns regarding matters of independent professional judgment; to the contrary, a lawyer should face criticism within the firm for failing to raise concerns in appropriate situations. The firm liberally should allow assisting lawyers to opt out of working on matters that give them a sense of discomfort. If, however, a lawyer constantly opts out of matters, the lawyer and the firm should face the possibility that their relationship is incompatible.

The approach suggested here is practical. Some law firms, perhaps a majority, already have policies of this type. Without such a policy, a firm is not fully independent because its managing partners lack the input from other lawyers that is essential to assure the independence of the law firm itself.

Although I suggest that fully independent firms comply with this attribute in its entirety, I recognize that other firms may prefer not to. All law firms, however, should at least comply with a minimal version of this attribute and should allow, even if they do not require, their lawyers to express concerns on matters of professional conduct.

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49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (1983). The Code does not contain any similar provision. *See generally* C. WOLFRAM, *supra* note 41, at 881-83; Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (1985); Levinson, *Young Lawyer*, *supra* note 1.

D. *The Firm Does Not Have any Significant Financial Involvement with Any of Its Clients Other than Cost Reimbursements and Fees Payable in Money*

This attribute requires the law firm to avoid any significant financial involvement with any of its clients other than cost reimbursements and fees payable in money. This means, for example, that no lawyer in the firm should be an officer or a member of the board of directors of any client corporation; be substantially involved with any client as owner, creditor, debtor, employee or contractor; be named as a client's executor, trustee, guardian, or attorney in fact; or serve in any other capacity than as an attorney at law.

In applying this standard, related parties should be treated as one; for example, the spouse of a lawyer in the firm should not be an employee or a substantial investor in a subsidiary of any of the firm's client corporations. This may seem extreme, but I propose it as the best way to assure the objectivity of the firm and all of its lawyers.

The law firm should establish fee arrangements in terms of money unless the firm renders its services without charge. The firm should not take a fee from any client in any nonmonetary form such as a "piece of the action." As regards reimbursements for costs, the firm should make clear arrangements with the client in advance and these reimbursements should be payable only in cash.

A law firm would not qualify under this attribute by being independent as to one client but not as to another. Nor would the firm qualify by establishing a "Chinese wall" to screen any individual lawyer from contact with a matter in which that lawyer was financially involved.[50] For reasons discussed later, this attribute requires the firm and all of its lawyers to maintain full independence as to all clients. The next attribute reinforces this independence by preventing the firm from relying on any one client for a major percentage of its fees.

Why should a law firm be independent of all or even any of its own clients? The law firm, after all, is neither an independent auditor[51] nor a judge, but rather is a confidential advisor and is sometimes called upon to serve as a representative and an advocate. Why should the law firm and its members not have a financial stake in the client if that is what the firm and the client want?

A law firm that is not financially independent of its clients loses part of its claim to objectivity and credibility. The law firm can too easily fall under the influence of clients or become embroiled in the internal management of clients.[52] For example, a law firm's advice to a corporation on a pending corporate

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50. Some courts allow a law firm to escape disqualification if it establishes a "Chinese wall," that is, an honor system to screen an individual lawyer from others in the firm, when the individual is considered to be tainted by grounds that could require his or her disqualification from a particular matter. *See, e.g.*, Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983); Tenn. Bd. Prof. Resp. Formal Ethics Op. 89-F-118 (1989) (approving use of screening procedures to allow a law firm to escape disqualification, whether the disqualified individual comes from governmental or private practice, and whether that person is a lawyer, law clerk, paralegal, or legal secretary).

51. *See* United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984) (distinction between roles of lawyer and independent auditor, in context of IRS access to client information in hands of professional); 17 C.F.R. § 210.2-01 (1989) (SEC requirement on qualifications of independent auditor).

52. *See generally* Curzan & Pelesh, *The Changing Role of Outside Counsel: A Proposal for a Legal "Audit,"* 56 NOTRE DAME LAW. 838 (1981); Gruenbaum & Oppenheimer, *Special Investigative Counsel: Conflicts and Roles*, 33 RUTGERS L. REV. 865 (1981); Lorne, *The Corporate and Securities Adviser, the Public Interest,*

takeover or a proposed bankruptcy filing may be affected by the firm's self-interest if the firm or its members have significant financial stakes other than a monetary fee for their legal services. As another example, a lawyer who drafts a will for a client that names the lawyer as executor may be motivated by the prospect of receiving fees as executor rather than by a desire to recommend the most appropriate person to serve as executor.

Lawyers who serve as officers or directors of their corporate clients cause numerous difficulties and uncertainties. Other board members may not know if the lawyer-director is speaking as lawyer or as director; the lawyer-director may be called as a material witness to matters in which that person participated as a director, and may consequently be disqualified from continuing to serve as a lawyer;[53] in corporate takeover situations, the loyalties of the lawyer-director may be divided between the old management and the corporation which may benefit from a change in management. The lawyer-director may also deprive the corporation of participation in a free market for legal services by depriving other law firms of fair access to the opportunity to render legal services to those clients. And as a practical matter, the law firm itself incurs a high level of exposure to disqualification from litigation, discharge by the client, and civil liability arising from its members' involvement in the business of the client.[54]

Noncash fees offer certain advantages to the client by making services available to clients with limited cash flow and symbolizing the law firm's participation in the client's risks. I concede that in some settings, informed clients may prefer to arrange a noncash fee to one payable in cash. Some law firms may quite appropriately offer this type of arrangement, although it impairs their independence, so long as clients wishing to enter into arrangements for cash fees have access to an adequate number of independent law firms that limit themselves to arrangements for cash fees.

The fee in the form of a "piece of the action" impairs the law firm's independence for three reasons. First, the lawyer may have a much better understanding than the client regarding the value of the nonmonetary fee in relation to the legal services rendered. As a result, this fee arrangement may allow the lawyer to take unfair advantage of the client and the desire to enter into such an arrangement may prevent the lawyer from giving the client objective advice. Second, upon receiving the nonmonetary fee, the lawyer is likely to become the client's partner or co-owner of the property. This relationship impairs the lawyer's independence in rendering any future legal services to the same client. Third, if a law firm receives noncash fees from its clients, the firm must create a holding company or establish some other means of managing its noncash assets. The need to manage these assets and the need to account for them when calculating how to distribute the law firm's revenues among the partners must create

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and Professional Ethics, 76 MICH. L. REV. 423 (1978); *Symposium on the Law Firm as a Societal Institution*, 37 STAN. L. REV. 271 (1985); Symposium: *The Role of Counsel in Corporate Acquisitions and Takeovers: Conflicts and Complications*, 39 HASTINGS L.J. 573 (1988).

53. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1980).

54. *See* 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE §§ 20.11-12 (1989).

serious distractions from the law firm's primary mission and may render the law firm dependent on nonlawyer financial managers.

If law firms generally are financially involved in the business of their clients, society may perceive the law firms in the same way as if the law firms were engaged in a nonlaw business—as abusing their privilege to practice and making unfair use of the inside information they obtain from clients. In addition, society may resent the tendency of law firms to "muscle in" on the business of their clients.

Why should this attribute apply to the law firm's relationship with all clients? Why not allow a law firm to be financially involved with one client or arrange for a nonmonetary fee with one client and still claim to be independent as to all other clients? The reason is that this Essay proposes that some firms should qualify as independent law firms by conducting their entire practices in accordance with a set of attributes designed to assure a high level of independence. The identification of a firm as independent will have an impact on the firm's ability to attract clients, to recruit personnel, to function in the profession, and to operate in other ways discussed in the last part of the Essay. The firm is likely to adopt a distinctive style of practice management, suited to its status and self-image as an independent law firm.

I realize that the attribute now under consideration may be the most troublesome of all my proposals. In case its implementation appears too difficult, I offer three fall-back proposals. The first would allow the firm to represent a client even though a lawyer in the firm is financially involved with the client provided the lawyer is screened from participating in the matter by a "Chinese wall."[55] The second would allow the law firm to depart from the requirements of this attribute with the prior consent of an independent and authoritative person such as a disinterested judge (although I appreciate the possibility that law firms may engage in forum shopping in the hope of finding someone who will give perfunctory approval). The final option is to allow a law firm to be financially involved with its own clients, but to require disclosure of this involvement in all communications likely to be relied upon by third parties; this last position conforms approximately to the current rules of the Securities and Exchange Commission.[56]

E. *The Firm Does Not Expect to Receive a Major Percentage of Its Fees from Any One Client*

My final proposed attribute is that the law firm should not expect to receive a major percentage of its fees from any one client. I recognize the difficulty of defining what constitutes a "major" percentage. Perhaps a professional organization could develop guidelines, or perhaps it would suffice to regard a fee as "major" if the risk of its loss would be reasonably likely to impair the objectivity and independence of the law firm.

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55. *See supra* note 50.

56. 17 C.F.R. § 229.509 (1989) (SEC requirement that lawyer disclose interest in corporation).

If a law firm has only one client, the firm is in substantially the same position as house counsel employed by the client. The firm may not lose its independence entirely but the firm lacks the full measure of objectivity and credibility of a completely independent firm.

For similar reasons, a law firm cannot be completely independent if one client produces a major percentage of the firm's revenue from fees. The independent law firm should therefore have a broad enough base of clients to prevent the firm's reliance on any one client for a major percentage of its fees. At some stages of a law firm's development, this may be a difficult goal to achieve. A firm should be regarded as independent if it is making reasonable efforts to reach this position.

III. How to Assure the Existence of an Adequate Number and Variety of Independent Law Firms

The legal profession should take steps to assure the continued existence of an adequate number and variety of independent law firms so that every client wishing to retain such a firm has an opportunity to do so. We cannot responsibly leave the future of this type of firm to chance because the risk to society is too high.

Enforceable rules already require law firms to be independent to some extent; for example, the ABA rule prohibits law firms from admitting nonlawyers to partnership, and even the new D.C. rule places significant limits on nonlawyer partners.[57] I support the existing rules protecting law firm independence and I would not object to the adoption of additional rules, for example, to limit the rendition of nonlaw services by law firms.[58] I do not, however, advocate adoption of rules to impose all of my proposed attributes of independence upon all law firms because I am not convinced that society needs all firms to possess all of these attributes. Instead, we should first establish and publicize standards of law firm independence, and then give the informed market an opportunity to operate in conjunction with appropriate regulatory action.

A. *Responsibility of the Legal Profession*

Members of the legal profession practice in various settings, but have some important features in common—virtually the same type of education, license, and basic professional standards. Our general-purpose bar associations offer us opportunities to deal collectively with matters of general concern to the profession and to society. Our advisory role in judicial selection and in the public forum reinforces our unity rather than our diversity. We have displayed profession-wide solidarity in the past in our support of legal services for the indigent, civil rights, and other matters of social concern.[59] We should give the same type of support to assuring the future of the independent law firm.

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57. *Supra* notes 2, 31-44.

58. *See, e.g.*, the recommendation recently adopted by the ABA Section of Litigation, *supra* note 24.

59. The Preambles to the Model Rules of Professional Conduct and the Model Code of Professional Responsibility emphasize the collective responsibility of lawyers to improve the legal system and the administration

All lawyers have a part to play in establishing and publicizing the standards of the independent law firm. Once a set of standards has been adopted, each law firm should seriously consider the standards and determine whether or not to adopt these standards and identify itself as independent. Firms that identify themselves as independent law firms should cooperate with firms that do not, for example, by referring clients to an appropriate type of firm and remaining open to lateral hiring of lawyers from the other type of practice. While the standards are being drafted, and during any period when their adoption is voluntary, firms should refrain from taking any significant moves away from independence if the primary motivation is to achieve a grandfathered exemption from potential new rules.

House counsel have a special opportunity and responsibility. They perform a vital function in advising corporate management when to retain outside law firms and in recommending the specific firms.[60] House counsel should make sure corporate management understands the advantages and disadvantages of retaining independent law firms and should advise management conscientiously which type of firm is preferable in a given situation. Judges should remain informed about the efforts of the legal profession to define the independent law firm and give serious consideration to any proposed rules designed to preserve the independent firm by regulation.

B. *Establishing and Publicizing the Standards of Independence*

In order to make the proposals workable, the legal profession needs an authoritative definition of "independent law firm." One approach would be to obtain a pronouncement, such as an ABA ethics opinion, ABA resolution, court decision, court rule, or FTC regulation, declaring that terms such as "law firm," "attorneys at law," and "counselors at law," are misleading unless they refer to a firm that possesses the five attributes discussed in this Essay. A pronouncement to this effect might conform quite closely to the meaning of these terms in the mind of the average reasonable person. If, then, these terms can be properly applied only to an independent law firm, other types of firms must use other terms to identify themselves. For example, a nonindependent firm might be required to identify itself as "a firm of lawyers, accountants, and economists," or "a firm of lawyers that offer legal services and business advice in exchange for equity interests in their clients' business or property."

If no authoritative pronouncement defines terms such as "law firm" and limits their use to mean only independent firms, the legal profession should find another way to establish a standard description of such firms. This could be achieved, for example, by creation of a special organization, conceivably a section of the ABA or even a completely new organization. It should provide the principal forum for discussing and ultimately adopting standards of indepen-

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of justice. MODEL RULES OF PROFESSIONAL CONDUCT (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

60. *See* MacDonald, *Speculations by a Customer About the Future of Large Law Firms*, 64 IND. L.J. 593 (1989).

dence. Then the organization should prepare and publicize an explanation of these standards. Any law firm seeking membership in the organization should undertake to conform to those standards. By identifying itself as a member of the organization, a law firm will hold itself out to the profession and to the public as subscribing to those standards.

Perhaps the most difficult task of the organization—or of the leadership of the profession—will be to determine whether to depend entirely on voluntary compliance in the first instance, or to propose some immediate regulatory measures to protect independent law firms in case the market fails to do so.

C. *The Market*

Many clients and third-party consumers of legal services may find the concept of the independent law firm quite attractive. For example, clients may be greatly relieved to find law firms willing to render legal services without demanding a "piece of the action" in the clients' business or property, investors may insist on receiving opinion letters from independent law firms, and clients and third parties located in other countries may find the independent law firm especially attractive if it happens to approximate the role of lawyers in their own countries.[61]

So long as independent and nonindependent types of practice coexist, both types will compete in recruiting and retaining individual lawyers. By "voting with their feet," individual lawyers will significantly affect the supply side of the market's response to the independent law firm. In another area of the market, insurance companies offering professional liability coverage may conclude that independent law firms pose a different type of risk and should therefore pay different premiums than other firms.

The market may, however, display selectivity in its support of the independent law firm. Large corporate clients may take one approach while individual and small business clients may take another. If the market does not voluntarily support and adequate number and variety of independent law firms in all major types of practice, serving all types of clientele, regulatory intervention will be appropriate.

D. *Regulation if Necessary*

The organization or the leadership of the profession may seek some degree of regulation at the very beginning, with later escalation if necessary, or may withhold any regulation during an experimental period of voluntary compliance. Some readers, no doubt, will object to regulation as a means of preserving an institution that cannot survive in a free and informed market. I have my own concerns along the same lines, but I would support regulation as a last resort in this situation because of the various ways in which the independent law firm can make essential contributions to the public interest, as discussed throughout this Essay.

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61. *See infra* notes 70-74 and accompanying text.

Some aspects of law firm independence are already incorporated into rules of professional conduct.[62] One approach is to expand and strengthen these rules, so as to require all lawyers to conform to additional standards of independence. The resolution recently adopted by the ABA Section of Litigation takes this approach by proposing new rules to place limits on the ancillary business activities of law firms.[63]

The organization or leadership of the profession could pursue another regulatory solution by promulgating an authoritative definition of the independent law firm. Next, regulations could give independent law firms an exclusive market for certain types of practice. For example, a state or federal agency administering securities or tax laws could require parties to submit certain documents bearing the signature of an independent law firm, or a court could limit certain types of litigation practice to attorneys associated with independent firms.

Finally, regulations could provide benefits to independent law firms as incentives or rewards for engaging in this type of practice. The rationale is that independent law firms, by choosing that status, demonstrate a special commitment to the public interest and may therefore receive preferential treatment.

IV. Other Professions and Other Countries

The legal profession in the United States is not alone in facing the issues discussed here. Remarkably similar issues confront other professions in this country, as well as the legal profession in other countries. This part of the Essay comments, as examples, on the public accounting profession in the United States and on the legal profession in Europe, and suggests how law firms in the United States should react to current developments in other professions and other countries.

A. *The Public Accounting Profession in the United States*

A committee report recently distributed for comment by the Florida Board of Accountancy illustrates the concerns facing the public accounting profession in the United States today.[64] The report first discusses "scope of services," an issue virtually identical to the issue of law firms "branching out" into areas beyond their primary field of expertise. In the case of public accounting firms, the primary field is the "attest" function of rendering audit reports on the financial statements of clients. Public accounting firms have steadily expanded the scope of their services far beyond this function, with the result that major public

62. *Supra* notes 12-17.

63. *Supra* note 24.

64. Ad Hoc Committee to Study the Structure of CPA Firms, Structure of CPA Firms: A Report for the Board of Accountancy, Florida Department of Professional Regulation, State of Florida (Sept. 13, 1989) (distributed for comment by the Board of Accountancy).

accounting firms derive significant revenues from tax services and a wide range of activities loosely described as management advisory services.[65]

The Committee reviewed reports prepared within the past few years by various nationwide study groups in response to concerns that expansion of nonattest functions may tend to impair the independent performance of the attest function. The Committee concluded that none of the prior studies presented evidence of such impairment; consequently the Committee did not propose to curtail the exercise of nonattest functions by public accounting firms.

Having reached this conclusion, the Committee addressed its other major issue—whether public accounting firms should be allowed to admit non-CPAs as partners. At present, statutes prohibit non-CPAs from becoming partners. The Committee recommended a statutory amendment that would allow non-CPAs to become partners subject to certain limitations.[66]

I object to the Committee's recommendations for reasons resembling those set forth in this Essay regarding similar issues in the legal profession. In addition, I would reformulate the Committee's question about the results of the recent expansion of nonattest functions. Instead of asking whether the expansion of these services has impaired the independence of the audit function, I would ask whether there is a reasonable probability that the expansion of nonattest services is linked with the increase in reported cases of audit failure. In response to this question, I perceive a significant connection, especially during the past two decades.[67] In my opinion, the independence of the public accounting profession in performing its primary mission—the attest function—has indeed been seriously compromised by the expansion of nonattest services. I propose a curtailment of nonattest services by public accounting firms and favor the continued exclusion of non-CPAs from partnership in public accounting firms. In short, I propose that public accounting firms should concentrate on rendering audit services just as law firms should concentrate on rendering legal services.

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65. The Committee reports that public accounting firms render the following types of services: Actuarial services, executive recruiting, marketing consulting, plant layout, telecommunications planning, strategic planning services, information technology planning and implementation, systems development, human resource consulting, manufacturing productivity consulting, merger and acquisition services, valuation and appraisal services, and educational services. The Committee also notes that public accounting firms are involved in marketing proprietary products such as computer software. *Id.* at 6.

66. The Committee proposes to attach the following limitations to the admission of non-CPA partners to public accounting firms: (1) The non-CPA must be active in the practice of the firm; (2) the non-CPA must state to clients and potential clients that he is not a CPA; (3) the non-CPA must not have direct supervisory authority for the business and practice of any office of the CPA firm; (4) the non-CPA must comply with requirements promulgated by the State Board of Accountancy regarding registration, qualifications, and continuing education; (5) the non-CPA must not perform or directly supervise audits, reviews or compilations of financial statements; (6) the non-CPA must not perform or directly supervise tax advisory, tax compliance or personal financial planning services unless the non-CPA is a member of the bar of any state; and (7) the total number of non-CPA partners must be less than a majority of all partners (or no more than one-third of all partners if the total number of partners is 25 or fewer). *Id.*, app. at 1-5 (draft statute attached as appendix to report).

67. *See, e.g.*, GENERAL ACCOUNTING OFFICE, GAO/AFMD-89-38, REPORT ON CPA AUDIT QUALITY (1989); GENERAL ACCOUNTING OFFICE, GAO/AFMD-89-45, REPORT ON CPA AUDITS OF SAVINGS AND LOANS (1989); Note, *The Big Eight, Management Consulting and Independence: Myth or Reality?*, 61 S. CAL. L. REV. 1511 (1988). *Cf.* Leinicke & Fish, *A Different Approach to Serving Clients*, J. ACCT., Jan. 1990, at 53; Mednick, *Independence: Let's Get Back to Basics*, J. ACCT., Jan. 1990, at 86.

The continued expansion of the scope of services offered by public accounting firms has become a matter of concern to some members of the legal profession. A recent report in the ABA Journal on law firm diversification attributes the following opinion to a principal of a prominent firm that consults on the management of law firms: "[By branching out into nonlegal areas] . . . the legal profession only will be doing what is already practiced by, for example, accounting firms that do tax law and banks that engage in estate planning. 'Lawyers aren't going to let themselves be left out much longer'. . ."[68]

At one time the legal profession and organizations representing other professions used to enter into "treaties" that tended to place limits on encroachment by one profession upon the domain of another.[69] No doubt these treaties would raise serious questions under today's antitrust laws as well as under current notions of deregulation and free competition. The treaties probably served a valuable purpose and I doubt their abolition has helped society or any clients. In today's political climate, however, I do not propose to reinstate the treaties.

Instead, along the lines discussed earlier in this Essay, I propose requirements that would compel all law firms and all public accounting firms to disclose publicly whether their practices are law firms limited to the rendition of legal services; public accounting firms limited to the performance of the attest function; or firms which fit neither of the above categories, in which case the firms should clearly identify the nature of their practices. At the same time, the ABA and its counterpart, the American Institute of Certified Public Accountants, should publish explanations of such terms as "law firm" and "public accounting firm," together with discussions of the advantages and disadvantages associated with firms that concentrate their practices on legal services or audit services.

If the marketplace does not respond by favoring the independent law firm and the independent public accounting firm, I propose regulatory solutions in the public interest. If regulatory solutions are adopted, no doubt someone will object and litigate on antitrust grounds. The ultimate remedy will then lie with Congress and the courts.

B. *The Legal Profession in Europe*

The roots of the legal profession in Europe go back centuries before the Europeans discovered North America. Europeans are now having to reconsider many of the traditions of their separate countries in light of the extensive moves toward European economic integration by the end of 1992. One aspect of integration is the possible creation of multinational law practices. This development conforms to the general principles of integration within the European Community. Its implementation, however, will require changes to the existing professional rules so as to allow lawyers to combine with colleagues from other Community countries either in the form of partnerships or in looser types of

68. Gibbons, *supra* note 4, at 68, 73.

69. *See* C. WOLFRAM, *supra* note 41, at 824.

associations such as European Economic Integration Groups (EEIGs).[70] In order to pave the way for developments along these lines, the Council of European Bar Associations has established a working group and adopted a Common Code of Conduct.[71]

The multinational practice is not the only proposed innovation. Europeans are also discussing the possibility of allowing the creation of multidisciplinary practices (MDPs) which would offer nonlegal as well as legal services and permit nonlawyers as well as lawyers to be partners. Pending bills in the United Kingdom Parliament would deregulate this aspect of the practice of law and allow the legal profession to adopt its own rules that could permit the creation of MDPs as well as multinational practices.[72] Opinion in the United Kingdom is sharply divided on this issue. One of the objections to allowing MDPs in the United Kingdom is that other European countries may find MDPs unacceptable and therefore regard such firms as ineligible for inclusion in multinational law practices.[73]

Many law firms in the United States have already established offices in Europe as well as other overseas locations. American firms are likely to take an increasing interest in Europe as integration comes closer to reality. In a recent discussion with the ABA Journal, the managing partner of the London office of a major U.S. firm predicted full-scale mergers between American and British law firms within the next two to five years. His explanation is quite frank: "A big part of the reason . . . is the increasing competition among law firms at home, the saturation of legal services and the growing problems of conflict of interest. . . . American firms need new clients, and they can find them in Europe."[74]

The legal professions in the United States and in Europe face serious uncertainties about the future of multidisciplinary practice as well as other issues, such as those explored in this Essay. It seems most appropriate that the profession in each continent should resolve its own identity crisis before any firms establish intercontinental partnerships or other relationships of long term association. Even after some of the existing problems have been resolved in each continent, some basic incompatibilities among legal systems and legal professions will present serious obstacles to multinational partnerships. For example, Euro-

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70. On EEIGs, see generally *Cross-Border Mergers of Public Limited Companies*, 1 Common Mkt. Rep. (CCH) ¶ 1441.01 (1988); *On the European Economic Interest Grouping (EEIG)*, 1 Common Mkt. Rep. (CCH) ¶¶1451-52t (1988).

71. *Supra* note 9. The CCBE Code is similar, in some respects, to the International Bar Association International Code of Ethics, INTERNATIONAL BAR ASSOCIATION INTERNATIONAL CODE OF ETHICS (1988 ed.).

On developments in Europe, see generally DeVries, *The International Legal Profession—The Fundamental Right of Association*, 21 INT'L LAW. 845 (1987); *The Legal Profession and Legal Services*, 14 INT'L LEG. PRACT. 34 (1989); Willig, *Why We Need Foreign Legal Consultants in Florida*, FLA. B.J., Feb. 1990, at 23.

72. Courts and Legal Services Bill [H.L.], cl. 48 (1989); Law Reform (Miscellaneous Provisions) (Scotland) Bill [H.L.], cl. 23 (1989). *See also* Carlisle, *English White Paper Law Reforms: An Outline for Equal Access to Justice?*, N.Y. ST. B.J., Jan. 1990, at 54; Flood, *Megalaw in the U.K.: Professionalism or Corporatism? A Preliminary Report*, 64 IND. L.J. 569 (1989).

73. *See* LAW SOCIETY OF SCOTLAND, PUBLIC PROTECTION: PROFESSIONAL INDEPENDENCE 57 (1989) (response of the Council of the Law Society of Scotland to the Scottish Home and Health Department's consultation paper, "The Legal Profession in Scotland").

74. Harper, *Going Global: Big Law Firms Expand Overseas*, A.B.A.J., Sept. 1989, at 68, 70.

pean traditions include, to one extent or another, separation between the practices of barristers and solicitors, prohibition of contingent fee arrangements, and immunity of barristers from civil liability. In addition, European and American lawyers have different systems of legal education, apprenticeship, career tracks, career mobility, and judicial selection.

It seems premature at this time for American law firms to intervene in the European Community's resolution of its own problems. Even if our firms have the opportunity to establish preliminary relationships with European firms, we should exercise restraint lest we burden our European colleagues by exporting our own problems. Further, any serious involvement by American law firms in European law practice, in its present unsettled state, would oblige us to consider the Europeans as another of our constituencies while we are trying to solve our own problems, and to that extent would add a new complication tending to impede our exercise of independence.

V. CONCLUSION

The powerful forces advocating deregulation and free competition may tempt us to think we are at liberty to seize whatever business opportunities come our way. Much as we may wish to be free, however, we are not. We are burdened by duties to society as the inevitable price of accepting the awesome privilege of practicing law. These duties require us, for reasons stated in this Essay, to give every client the opportunity to retain an independent law firm.

We should be seriously concerned about the pending proposals by some lawyers and accountants in this country, and by the advocates of multidisciplinary practices in Europe, to dilute or even abandon professional independence. We should not, however, conclude that theirs is necessarily the wave of the future. To the contrary, I hope and believe there is a bright future for independent law firms and for independent firms in other professions that practice exclusively in their respective fields of expertise, such as auditing. The multidisciplinary firm, on the other hand, faces a series of problems, many of them flowing from the risk that the firm may not have a distinctive professional identity.

With the passage of time, the recent emergence of multidisciplinary firms in this country and the pending proposals for similar types of practice in Europe may look like aberrations in the history of the professions. Each profession, by reaffirming its own distinctiveness and independence, may contribute to renewed pride and satisfaction in the practice of each and best serve the interests of society.